STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 39-80:

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, Complainant, VS. FERGUS COUNTY AND ALL REPRESENTATIVES OF FERGUS COUNTY, MONTANA, Defendant	FINDINGS OF FACT, CONCLUSION OF LAW AND RECOMMENDED ORDER

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I. INTRODUCTION

This charge was filed by Complainant on September 9, 1980 alleging that Defendant had violated 39-31-401 (5) MCA by its refusal to abide by an arbitration award. Defendant denied the allegation. The matter was set for hearing under authority of 39-31-406 MCA. A pre-hearing conference was held on March 3, 1981 at which it was agreed that Defendant's attorney would draft a stipulation on the facts. At an abbreviated hearing held on March 10, 1981 the parties stipulated to the facts with which this case is concerned. Complainant was represented by Mr. George F. Hagerman; Defendant by Mr. Bradley B. Parrish.

II. ISSUE

The issue raised here is whether Defendant violated 39-31-401 (5) MCA when it refused to abide by an arbitrator's decision.

III. FINDINGS OF FACT

The following are the facts to which the parties stipulated on March 10, 1981:

1. Morris Fischer was an employee of Fergus County Road Department. He was covered by the collective bargaining agreement

between the parties.

2. Article XI-B of the agreement provides as follows:

> Health and/or Accident Insurance-the employer shall contribute towards the provisions of such insurance at the premium rate for each employee and dependents desiring such coverage, but not to exceed $60.00 per month. Such insurance shall include an employee/family dental plan with no deductible. Covered claims incurred under this dental plan shall not exceed $1,000.00 per year.

3. Mr. Fisher incurred dental expenses in the amount of $465.00. The insurance provided under Article XI of the agreement paid $219.90. The remaining $245.10 was not covered by the policy and has not been paid.

4. A grievance was filed on December 10, 1979 claiming the County owed the $245.10 not covered by the insurance. The County refused to pay.

5. An arbitration hearing was held on February 6, 1980. On March 3, 1980 the arbitrator found in Mr. Fisher's favor. The County refused to honor the arbitrator's award. Complainant then filed this unfair labor practice charge.

IV. DISCUSSION

The Board of Personnel Appeals has consistently held that a refusal to participate in the processing of a grievance through the procedure established in the collective bargaining agreement, including the submission of the matter to binding arbitration, is tantamount to a refusal to bargain in good faith and, therefore, violates 39-31-401 (5) MCA. See ULP 5-80, American Federation of State, County and Municipal Employees, AFL-CIO vs. Mr. Paul Tutvedt, Mr. Ken Siderius and Mr. Keith Allred, Kalispell School District No. 5; ULP 7-80, Havre Education Association vs. Hill County School District No. 16 and A; ULP 30-79, Savage Education Association, affiliated with Montana Education Association vs. Savage Public Schools, Richland County Elementary District 7 and High School District 2; City of Billings vs. Local 521 I.A.F.F., ULP 3-76;

Painters Local 1023 vs. Montana State University, ULP1-75. The National Labor Relations Board holds that collective bargaining is a continuing process and that it involves day-to-day adjustments in the contract and other working rules, Conley vs. Gibson, 355 U.S.41,46,41 LRRM 2089 (1957). The Montana Supreme Court, in City of Livingston vs. Montana Council No. 9, AFSCME, 174 MT 421, 571 P. 2d 374 (1977) held that the duty to bargain in good faith continues during the entire course of the contract and it includes the processing of grievances, citing Timkin Roller Bearing Co. vs. NLRB, 161 F.2d 949, 954 (6th Cir.1947).

I agree with complainant, it is clear under both state and federal law that an employer is obligated to submit grievances to binding arbitration, if the collective bargaining agreement so provides. However, that is not the issue raised by this charge. The facts are clear, the county did not refuse to process the grievance. On the contrary, the grievance was processed all the way through arbitration. What the county refused to do was abide by the arbitrator's decision. That refusal raises an entirely different question from a refusal to process a grievance under the terms of the contract.

The question of whether failure to implement an arbitration board's award was an unfair labor practice was answered by the Board of Personnel Appeals in International Association of Fire-fighters, Local No. 630 vs . City of Livingston, ULP 2-74, where the majority held that a refusal to follow the arbitration award did not constitute a failure to bargain in good faith. The Board went on to say, ". . .by the time a grievance has gone into final and binding arbitration, as here, no element of bargaining exists for there is nothing to negotiate."

The NLRB deferred to an arbitration award and dismissed an unfair labor practice charge in Malrite of Wisonsin, Inc., 198

NLRB No. 3 at 3, 80 LRRM 1593 (1972) because, it reasonsed, the award met the standards set forth in its Spielberg doctrine. Under that doctrine, announced by the NLRB in Spielberg Manufacturing Co., 112 NLRB 1080, 1082, 36 LRRM 1152 (1955), three prerequisites for deferral to arbitration must be met. First, the arbitration proceedings must have been fair and regular; secondly, the parties must have agreed to be bound by the award; and, the decision must not be clearly repugnant to the purposes of the National Labor Relations Act. If those conditions are met, the NLRB will adopt the arbitration award as the complete remedy for unfair labor practices related to the dispute. The Board went on in Malrite, supra, to explain that noncompliance with an award was not a matter for its concern:

> In its formulation of the Spielberg standards the Board did not contemplate its assumption of the function of a tribunal for the determination of arbitration appeals and the enforcement of arbitration awards. If the Board's deference to arbitration is to be meaningful it must encompass the entire arbitration process, including the enforcement of arbitration awards. It appears that the desirable objective of encouraging the voluntary settlement of labor disputes through the arbitration process will best be served by requiring that parties to a dispute, after electing to resort to arbitration, proceed to the usual conclusion of that process -judicial enforcement - rather than premitting them to invoke the intervention of the Board.
> * * *
> Indeed, direct court enforcement of arbitrator's awards can provide more prompt and effective action than a procedure which requires a second trial before one of our trial examiners, an appeal to this Board, and only then a court proceeding which can lead to an enforcement decree. Surely, immediate access to the court is to be preferred over this long administrative route, and this is the course we are encouraging these and future disputants to follow. Accordingly, we shall dismiss the complaint in its entirety.

The U.S. Court of Appeals, District of Columbia Circuit, upheld the NLRB decision in Malrite. It held in IBEW Local 715 vs. NLRB, 85 LRRM 2823 (1974) that the employer's recalcitrance after arbitration did not preclude deferral to the award. It reasoned, "The policy established by Spielberg is to withhold Board processes where private methods of settlement are adequate. In this case, the arbitration process has foundered, but it has not proved

inadequate. The union may yet obtain compliance with the award by means of a suit for its enforcement. As long as the remedy of judicial enforcement is available, the force of the Spielberg doctrine is not diminished by one party's disregard for the arbitral award. The Board acted within its discretion, therefore, in insisting that the union pursue its judicial remedy."

It could be argued that since 29 U.S.C. Section 185(a) (Section 301(a) of the Labor Management Relations Act) specifically grants federal courts jurisdiction for violation of contracts and failure to implement an award can be remedied there and since the Montana Act does not contain a similar provision, the Board of Personnel Appeals should take a broader view of the matter. That argument was expressly rejected in International Association of Firefighters, Local No. 630, supra. The Board held that although the Act did not directly state how collective bargaining agreements are to be enforced, it was elementary that a contract could be enforced through civil action in a court of law.

As repugnant to one's sense of fair play as the County's refusal to honor the collective bargaining agreement may be, I believe it best promotes the purposes of the Act to adopt the principles and reasons laid down by the U.S. Circuit Court in IBEW and by the NLRB in Malrite, supra. It would seem unwise and impractical, if not impossible, for the Board of Personnel Appeals to attempt to enforce arbitration awards. A more expeditious method of enforcement would be to require the party with the award to go directly to district court.

There is nothing on the record to suggest that the arbitration award made in this case did not meet all the prerequisites of the Spielberg doctrine. That being so, I would defer to the award and require that Complainant seek enforcement in the courts.

V. CONCLUSION OF LAW

Defendant did not violate 39-31-401(5) MCA by its refusal to abide by the arbitration award.

VI. RECOMMENDED ORDER

It is ordered that this unfair labor practice charge be dismissed.

VII. NOTICE

Exceptions to these Findings of Fact, Conclusion of Law and Recommended Order may be filed within twenty days of service thereof. If no exceptions are filed, the Recommended Order shall become the Final Order of the Board of Personnel Appeals. Address exceptions to: Board of Personnel Appelas, Capitol Station, Helena, Montana 59601.

Dated this 30 day of June, 1981.

BOARD OF PERSONNEL APPEALS

By _____
JACK H. CALHOUN
Hearings Examiner

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 30 day of June, 1981:

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Deputy County Attorney
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